ORIGINAL

DOCKET FILE COPY ORIGINAL

RECEIVED

JUN 13 2005

Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Special Access Rates for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

COMMENTS OF AT&T CORP.

Pursuant to the Commission's Order and Notice of Proposed Rulemaking ("*Notice*"), FCC 05-18, released January 31, 2005, and published in the Federal Register on April 13, 2005, 70 Fed. Reg. 19381, AT&T Corp. ("AT&T") submits these comments.

INTRODUCTION AND SUMMARY

The Commission's last major review of its interstate special access regulations – the 1999 *Pricing Flexibility Order*[1] – led to the removal of price cap limits on incumbent local exchange carriers' ("ILECs") special access rates in entire MSAs on the basis of showings that competitive local exchange carriers ("CLECs") had made sunk investments in collocations and interoffice transport facilities. The Commission granted the ILECs increased pricing flexibility based on its predictive judgment that, given these CLEC investments, special access customers would enjoy generally lower rates from deregulation. Contrary to the Commission's predictions, however, rates are now generally above where they would have been if price caps had remained in effect.

[1] *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 98-63, 98-157, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221 (1999) ("*Pricing Flexibility Order*"), *aff'd*, *WorldCom Inc.* v. *FCC*, 238 F.3d 449 (D.C. Cir. 2001).

No. of Copies rec'd 0+6
List ABCDE

Accordingly, there is a need for the Commission to review and fine-tune certain aspects of its pricing flexibility regulations.

For instance, the Commission today grants MSA-wide pricing flexibility for end-user channel termination services based on a showing of CLEC deployment of collocations and interoffice transport facilities. The pricing flexibility rules also fail to reflect important circuit capacity and wire center density considerations that the Commission recognized in its *Triennial Review Remand Order* as highly relevant to competitive facilities deployment. While AT&T does not advocate imposing any new regulation on OCn-level services, the Commission should recalibrate its channel termination triggers and reestablish price cap regulation of those DS1 and DS3 end-user channel termination services that fail to meet the recalibrated triggers.

Similarly, the Commission should revisit its decision effectively to eliminate annual productivity or "X-Factor" price cap reductions for the special access basket. The X-Factor was established to ensure that ratepayers share with ILECs the benefit of significant gains in productivity. As the Commission explains in the *Notice*, there are clear indications that ILECs continue to experience considerable annual productivity gains in special access services. Given the size and sustained nature of these productivity gains over the last decade, moreover, the Commission should grant the recent request by eTUG and API for an interim rule establishing an X-Factor of 5.3 percent to become effective July 1, 2005,[2] which would apply while the Commission considers the issue further in this rulemaking proceeding.

In addition, as explained below, the Commission also should clarify that volume discounts may not be subject to unreasonable conditions and restrictions.

---

[2] Letter from Brian R. Moir, counsel for eCommerce & Telecommunications User Group and C. Douglas Jarrett, counsel for Telecommunications Committee of the American Petroleum Institute, to Marlene H. Dortch, dated May 10, 2005.

I. THE COMMISSION SHOULD RECALIBRATE ITS PRICING FLEXIBILITY TRIGGERS.

The Commission noted in the *Pricing Flexibility Order* that competitive carriers had built substantial local networks, and the Commission believed that price cap regulation could be progressively relaxed wherever such sunk investment in alternative facilities existed. *Pricing Flexibility Order* ¶¶ 65-67, 77-80. As both the Commission and the D.C. Circuit have acknowledged, however, the Commission's actual triggers can be a relatively crude measure of where such facilities exist.[3] The triggers turn on identifying "fiber-based" collocations in a fraction of the wire centers in a given Metropolitan Statistical Area (MSA). Where the triggers are satisfied, they provide price cap relief on all special access routes for a given service throughout that MSA. The imprecision of these triggers was partly by design: the Commission placed great importance in the *Pricing Flexibility Order* on having triggers that were easy to administer.[4] But the result has been that ILECs have won Phase II pricing flexibility not only where alternative facilities are either plentiful or feasible to build, but also in some areas where there is little such investment.

This proceeding thus represents an important opportunity for the Commission to achieve more fully the purposes of the original *Pricing Flexibility Order* by tailoring the triggers more precisely to the areas where alternative facilities are most prevalent. Sound practice suggests that this review should apply to all special access services, and most particularly to those services

---

[3] *Id.* ¶¶ 83-85, 90-92, 96 (need for bright-line rule "counsels against adoption of triggers that may provide more comprehensive measures of competition but impose heavy burdens on both the industry and the Commission"); *WorldCom Inc.* v. *FCC*, 238 F.3d 449, 459 (D.C. Cir. 2000) (triggers are "admittedly imperfect").

[4] *See, e.g., Pricing Flexibility Order* ¶ 84; *WorldCom*, 238 F.3d at 459.

where the disconnect between the triggers and the marketplace is the greatest: DS1 and DS3 end-user channel terminations.

First, the channel termination triggers do not directly measure alternative loop deployment. The triggers provide MSA-wide pricing flexibility for channel terminations if a certain number of wire centers in that MSA have collocations with competitive deployment of *trunk-side* transport that provides no direct information about how many loops competitive LECs have actually deployed.[5] Second, the Commission's channel termination triggers provide relief for *all* channel termination services in an MSA, without regard to capacity (*e.g.,* OCn-level *versus* DSn-level) or wire center density. As the Commission recognized in the *Triennial Review Remand Order*, however, although the customer revenues available from OCn-level services justify blanket deregulation of those services, a more nuanced analysis of DSn-level services is required.[6] At a minimum, therefore, the Commission should recalibrate its end-user channel termination triggers with respect to DS1 and DS3 channel terminations, and it should bring those services back under price caps wherever they do not satisfy effective triggers. This action would constitute a modest step that would be entirely consistent with the original goals of the pricing flexibility regime.

---

[5] *Pricing Flexibility Order* ¶ 103 ("collocation by competitors does not provide direct evidence of sunk investment by competitors in channel terminations between the end office and the customer premises"; "[w]e recognize, therefore, the shortcomings of collocation as a measure of competition for channel terminations . . . but it appears to be the best option available to us at this time").

[6] *See Unbundled Access to Network Elements, et al.*, WC Docket No. 04-313 *et al.*, Order on Remand, FCC 04-290, ¶¶ 149-53 (rel. Feb. 4, 2005).

II. THE COMMISSION SHOULD CONSIDER RE-IMPOSITION OF AN ANNUAL PRODUCTIVITY ADJUSTMENT.

Given the significant and ongoing productivity gains of the last decade, the Commission should give serious consideration to re-imposing an annual productivity offset (X-Factor) for the special access services that remain subject to price caps. This would ensure that ratepayers share in the benefits of special access productivity gains, as the Commission originally intended.

As the Commission notes, the special access price caps today are effectively frozen. In the *CALLS Order*,[7] the Commission established specific X-Factors for the special access basket for the five-year life of the CALLS plan (which expires on July 1, 2005). The Commission set the special access X-Factor equal to 3.0% for the 2000 annual access filing, and increased it to 6.5% for the 2001, 2002, and 2003 annual access filings. For the final year of the plan, the special access price caps were to be frozen, and thus the Commission's rules provide that "[s]tarting in the 2004 annual filing, X shall be equal to GDP-PI for the special access basket," 47 C.F.R. § 61.45(b)(1)(iv) – *i.e.*, the price cap rules will not require the ILECs to reduce their special access rates from current levels. *See Notice* ¶ 131.

As the Commission notes in the *Notice*, however, "this record contains substantial evidence suggesting that productivity has increased and continues to increase in the provision of special access services." *Notice* ¶¶ 26-29. The Commission explains that ARMIS data demonstrate that "BOCs have realized scale economies throughout the entire period of price cap regulation," *id.* ¶ 29 – *i.e.,* from 1992 through the present.[8] AT&T has examined ARMIS and TRP (tariff review plan) data for various historical periods ending in 2004 and has calculated the

---

[7] *See Access Charge Reform, et al.*, CC Docket Nos. 96-262 *et al.*, Sixth Report and Order, 15 FCC Rcd. 12962 (2000) ("*CALLS Order*").

[8] *Notice* ¶¶ 27-29 & nn.88-91 (citing and analyzing ARMIS data).

X-Factor that, had it applied throughout the period, would have resulted in an average RBOC rate of return in 2004 of 11.25 percent (the Commission's last approved rate of return). This "imputed" X-Factor for the special access category is invariably above the interim 5.3 percent X-Factor that eTUG and API have asked the Commission to make effective July 1, 2005.[9]

Although the issue of the precise level of an appropriate factor might prove complex, it is clear that the ILECs' special access businesses continued to thrive throughout the late 1990's and during the three years of the CALLS Plan (2001, 2002, and 2003) when a 6.5 percent X-Factor applied. Given this fact and the history of productivity gains, the Commission should not require ratepayers to wait for the conclusion of its rulemaking before sharing in these gains. For this reason, the Commission immediately should grant the recent request by eTUG and API for an interim rule establishing an X-Factor of 5.3 percent to become effective July 1, 2005.

III. THE COMMISSION SHOULD CLARIFY THAT VOLUME DISCOUNTS SHOULD NOT BE SUBJECT TO UNREASONABLE AND RESTRICTIVE CONDITIONS.

Finally, with respect to tariff terms and conditions, the Commission should clarify that volume discounts should not be tied to unreasonable conditions. For example, the Commission asks whether "it is reasonable to condition [a volume] discount to the (individual) customer's

---

[9] AT&T's "imputed" X-Factor calculations for the periods 1995-2004, 1996-2004, 1997-2004, 1998-2004, and 1999-2004 are, respectively, 8.94%, 9.50%, 10.15%, 9.30%, and 8.95%. Both the Commission and the D.C. Circuit have recognized that observed ARMIS-generated rates of return in excess of 11.25% constitute evidence that the X-Factor has been set too low. *See Price Cap Performance Review for Local Exchange Carriers*, First Report and Order, 10 FCC Rcd. 8961, ¶ 100 (1995), *aff'd, Bell Atlantic Tel. Cos.* v. *FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996) (upholding increased X-Factor based in part on the fact that "[t]he Commission originally predicted that sharing would be rare, . . . [but i]n practice, however, sharing had become routine. By 1993, all seven of the Bell Operating Companies were in the sharing zone, leading the Commission to believe that the original X-factor had been too low").

previous purchase level." *Notice* ¶ 122. The answer is no. The Commission just recently found such a condition imposed by BellSouth to violate section 272.[10]

Indeed, in the *Pricing Flexibility Order* itself (¶¶ 125-26), the Commission made clear that it expected ILECs not to impose conditions that effectively locked customers into purchasing service from the ILEC. The Commission already prohibits growth tariffs, *see Pricing Flexibility Order* ¶¶ 134-35, and in a declining market tariffs that condition volume discounts on a percentage of past usage are economically similar to growth tariffs. A long line of Commission precedent establishes that such unreasonable restrictions on the eligibility of volume or term discounts are unlawful.[11]

Volume discounts on an incremental scale are entirely reasonable, but such agreements need to provide flexibility to allow movement up and down the scale without penalties based on prior purchase levels. The only penalty should be in the form of different rates or discounts based on *current* purchase levels. Volume agreements should also provide the flexibility to migrate services to new technologies, or more efficient services without being penalized beyond the relative value of moving to the new technologies, or the more efficient service. An example of this restriction is Qwest Tariff F.C.C. No. 1, Section 7.1.8. C. Waiver Policy ("The total value of the new service must be equal to or greater than 115% of the remaining value of the existing pricing plan service. Nonrecurring charges and Special Construction charges will not be used for

---

[10] *AT&T Corp.* v. *BellSouth Telecommunications, Inc.*, 19 FCC Rcd. 23898 (2004) ("*BellSouth Order*").

[11] *See Transport Rate Structure and Pricing,* Third Memorandum Opinion and Order on Reconsideration and Supplemental Notice of Proposed Rulemaking, 10 FCC Rcd. 3030, ¶ 114 (1994) ("*Transport Rate Order*"); *Expanded Interconnection with Local Telephone Company Facilities; Amendment of the Part 69 Allocation of General Support Facility Costs,* Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd. 7369, ¶ 199 (1992) ("*Expanded Interconnection Order*"); *Private Line Rate Structure and Volume Discount Practices,* Report and Order, 97 F.C.C.2d 923, ¶¶ 34-36 (1984) ("*Volume Discount Order*").

the Waiver calculation"). This restriction requires carriers actually to spend more, or effectively force growth with new services, rather than upgrade to more efficient services.

Other conditions would be equally unreasonable. For example, the Commission should clarify that bundling a tariff discount with the condition that the customer terminates service with a competitor on the same route would be improper. *See Notice* ¶ 124. There are customers (retail and wholesale) that require diverse access to provide better reliability, and having conditions that require termination of services from other carriers would affect these service level requirements. There should also be no obligation to purchase unregulated or other services as a condition of receiving special access discounts absent some showing of a compelling cost-justification for such facially suspect limitations.

CONCLUSION

For the foregoing reasons, the Commission should amend its price cap and pricing flexibility rules.

Respectfully submitted,

AT&T CORP.

Judy Sello/lra

Leonard J. Cali
Judy Sello

AT&T Corp.
Room 3A229
One AT&T Way
Bedminster, New Jersey 09721
(908) 532-1846

Attorneys for AT&T Corp.

June 13, 2005